United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

77-7213

United States Court of Appeals

FOR THE SECOND CIRCUIT

JOHN ESPOSITO,

Plaintiff-Appellee,

—against—

UNITED STATES NAVIGATION INC.

—and—

SCINDIA STEAM NAVIGATION CO. LTD.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANTS' BRIEF

BURLINGHAM UNDERWOOD & LORD
Attorneys for Appellants
1 Battery Park Plaza
New York, N. Y. 10004

WILLIAM M. KIMBALL
of Counsel

UNITED STATES COURT OF APPEALS
FILED
JUL 21 1977
DANIEL FUSARO, CLERK
SECOND CIRCUIT

TABLE OF CONTENTS

PAGE

Issues 1

Statement 2

ARGUMENT:

I. Navigation was not the demise charterer of P-98 4

II. Navigation's agency was disclosed, and even if the agency were undisclosed, Navigation would not be liable to Esposito for P-98's unseaworthiness 6

III. Scindia is not liable "on the traditional concept of respondeat superior" 10

CONCLUSION 11

TABLE OF AUTHORITIES

Cases:

Aird v. Weyerhaeuser S.S. Co., 169 F. 2d 606 (3 Cir. 1948), cert. den. 337 U.S. 959 (1949) 5, 9

American Alkali Co. v. Kurtz, 134 Fed. 663 (E.D. Pa. 1905), aff'd 138 Fed. 392 (3 Cir. 1905), cert. den. 205 U.S. 544 (1907) 7

B. W. King, Inc. v. Consolidated Iron & Metal Co., 310 F. Supp. 471 (S.D.N.Y. 1970) 5

PAGE

Cannella v. Lykes Bros. S.S. Co., 174 F. 2d 794 (2 Cir. 1949), cert. den. 338 U.S. 859 (1949) 8, 9
Cannella v. United States, 179 F 2d 491 (2 Cir. 1950) 9
Connecticut Adamant P. Co. v. James McWilliams Blue Line, 149 F. Supp. 122 (S.D.N.Y. 1957), aff'd 253 F. 2d 785 (2 Cir. 1958) 9
Cosmopolitan Shipping Co. v. McAllister, 337 U.S. 783 (1949) 8
Cromwell v. Slaney, 65 F. 2d 940 (1 Cir. 1933) 9

Fitzgerald v. A. L. Burbank & Co., 451 F. 2d 670 (2 Cir. 1971) 4-5

Gaete v. Barber Steamship Lines, 57 Misc. 2d 167, 292 N.Y.S. 2d 155 (Sup. Ct., Kings Co. 1968) 6, 7
Grillea v. United States, 229 F. 2d 687, 232 F. 2d 919 (2 Cir. 1956) 10
Guzman v. Pichirilo, 369 U.S. 698 (1962) 5, 10

Hastorf v. F. R. Long, 239 Fed. 852 (2 Cir. 1917) 5

Instituto Cubano, etc. v. S.S. Theotokos, 155 F. Supp. 945 (S.D.N.Y. 1957) 6

McCoy v. American Israeli Shipping Co., 42 A.D. 2d 12, 344 N.Y.S. 2d 707 (1st Dept. 1973), aff'd 34 N.Y. 2d 569, 354 N.Y.S. 2d 944 (1974) 8
Monk v. Cornell Steamboat Co., 198 Fed. 472 (2 Cir. 1912) 5

Pichirilo v. Guzman, 290 F. 2d 812 (1 Cir. 1961), rev'd 369 U.S. 698 (1962) 9-10

PAGE

Ramos v. Beauregard, 423 F. 2d 916 (1 Cir. 1970), cert. den. 400 U.S. 865 (1970) 10
Reed v. The Yaka, 373 U.S. 410 (1963) 10

Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946) 8

Tamboris v. Kainis Compania Maritima, 439 F. 2d 1131 (5 Cir. 1971) 8
The Doyle, 105 F. 2d 113 (3 Cir. 1939) 9
The Willie, 231 Fed. 865 (2 Cir. 1916) 5

Valkenburg v. S.S. Henry, 295 F. 2d 330 (7 Cir. 1961) 6

Williams v. McAllister Bros., 534 F. 2d 19 (2 Cir. 1976) 8

Other:

Gilmore & Black, The Law of Admiralty (2 ed. 1975) .. 4

Healy & Sharpe, Cases and Materials on Admiralty (2 ed. 1974) 4

3 Moore's Federal Practice (2 ed. 1974) 9

Restatement of Agency (2d) 8

United States Court of Appeals

FOR THE SECOND CIRCUIT

JOHN ESPOSITO,

Plaintiff-Appellee,

—against—

UNITED STATES NAVIGATION INC.,

—and—

SCINDIA STEAM NAVIGATION CO. LTD.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANTS' BRIEF

This appeal is from final judgment entered on an unreported opinion by Chief Judge Mishler.

Issues

1. Was Navigation the demise charterer of P-98?
2. Was Navigation's agency disclosed?
3. Even if Navigation's agency were undisclosed, could Navigation be held liable to Esposito for P-98's unseaworthiness?
4. Is Scindia liable "on the traditional concept of respondeat superior"?

Statement

Appellee Esposito, a longshoreman employed by International Terminal Operating Co. [ITO], sued appellants United States Navigation Inc. [Navigation] and Scindia Steam Navigation Co. [Scindia] to recover damages for March 18, 1969 injury sustained when Esposito stepped through the deck of Petterson Lighterage & Towing Co.'s [Petterson's] unpowered barge P-98. Petterson went bankrupt several years before Esposito sued Navigation, and added Scindia as co-defendant (1a, 2a, 42a). Scindia made third-party indemnity claim against ITO.

There was bifurcated non-jury trial by Chief Judge Mishler (47a) who, in unreported opinions on liability (42a) and damages (47a), found that Esposito's injury was caused by "defect in the beams supporting the deck [which] could not be discovered by a reasonable inspection * * * a latent defect" (46a); held Navigation liable as demise charterer of P-98 (44a-45a); held Scindia liable as undisclosed principal of its agent Navigation (45a); dismissed the third-party claim against ITO (46a); and awarded Esposito $116,160 damages (49a), for which judgment was entered (50a).

Navigation and Scindia filed timely notice of appeal (2a) solely on the question of liability to Esposito. Dismissal of the third-party claim and the amount of Esposito's damages were not appealed.

To avoid Boston strike delay to Scindia's M/S *Jaladhanya* (5a, 13a, 24a), Boston consigned bales of sisal hemp were discharged from *Jaladhanya* onto Pier 12,

Brooklyn (6a-7a, 21a); taken by mobile crane to P-98 (7a, 21a), which was tied to the same side of the Pier, 15-25 feet astern of *Jaladhanya* (6a, 22a); stowed in P-98 by Esposito and other members of the same ITO gang which was unloading *Jaladhanya* (7a-8a, 19a); later towed to Columbia St. Pier, Brooklyn (13a-14a, 35a); and loaded aboard Scindia's M/S *Jalagopal* for carriage to Boston (37a, 41a).

Esposito's gang began working at 8 AM and continued until 8 PM when he was injured (7a, 16a). P-98's wooden deck (6a) appeared sound (9a, 12a, 18a, 20a), and Esposito walked on the place which later gave way at least 20-30 times before his unexpected accident (23a).

Petterson employed and paid P-98's attendant "captain" Reel (25a-26a, 30a) who "came with the barge" (11a). Reel's duties were to secure and adjust the barge's towing and mooring lines (15a, 27a-28a); pump, trim, and clean the barge (27a, 28a); prevent smoking and pilferage (29a); inspect the barge for damage (27a) and notify Petterson (31a), which made repairs at its own yard (29a-30a); and tally receipted cargo (15a, 29a, 33a-34a). Reel reported daily by phone to Petterson (30a-31a), and took orders solely from Petterson (30a).

Navigation was agent for several steamship companies using Pier 12, including Scindia and Ivaran Lines (10a-11a, 37a, 41a). From Feb. 27, 1969 to March 29, 1969, Ivaran Lines chartered P-98 from Petterson at $80 a day and, by March 31, 1969 invoice addressed to Navigation, Petterson billed Ivaran for those 31 days hire, the cost of towing P-98 to Pier 12, and Reel's March 18, 1969 overtime (38a, 39a, 41a). On June 27, 1969, Navigation in-

voiced M/S *Jaladhanya* for use of P-98 from March 18, 1969 to March 21, 1969 at $80 a day, the towing charge to Pier 12, and Reel's March 18 overtime (38a, 40a, 41a).

In addition to several immaterial errors, such as that "Reel was aboard the barge during the towing operation" (43a, *cf.* 35a); and findings unsupported by evidence, such as that P-98 was chartered "for an indefinite term" (42a); Judge Mishler mistakenly found that "the barge and its 'captain' were under the direct control of Navigation" (43a); Petterson "'completely and exclusively' * * * relinquished possession and control of the barge and placed Reel under Navigation's command" (44a); and "Navigation acted independently in the hiring" of P-98 as "agent of an undisclosed principal" (45a).

ARGUMENT

I. Navigation was not the demise[1] charterer of P-98.

Judge Mishler erroneously held (45a) that: "Navigation acted independently in the hiring. It was the demise charterer of the barge." The undisputed evidence is that Navigation was Ivaran Lines' agent (11a), and Petterson billed Ivaran for P-98's hire (39a). If anyone was a demise charterer, it was Ivaran.

Esposito did not sustain his "heavy burden" of overcoming the presumption against a demise. *Fitzgerald* v.

---

[1] Although "demise" and "bareboat" are commonly used synonymously, Gilmore & Black, The Law of Admiralty (2 ed. 1975) p. 194, "demise" may indicate that the owner engaged the crew. Healy & Sharpe, Cases and Materials on Admiralty (2 ed. 1974) p. 404.

A. L. Burbank & Co., 451 F. 2d 670, 676 (2 Cir. 1971). Judge Mishler appreciated (44a) that: "To create a demise the owner of the vessel must completely and exclusively relinquish 'possession, command, and navigation' thereof to the demisee." *Guzman* v. *Pichirilo*, 369 U.S. 698, 699 (1962). In endeavoring to satisfy that exhaustive requirement, the Judge erroneously found that P-98's "captain" was "under the direct control of Navigation" (43a); Petterson "placed Reel under Navigation's command" (44a). The undisputed evidence is that Reel "took [his] orders only from Peterson" [*sic*] (30a).

There is an old body of Second Circuit case law that charters of powerless New York Harbor craft with attendant "captains" are demises.[2] All such charters are not demises. In *B. W. King, Inc.* v. *Consolidated Iron & Metal Co.*, 310 F. Supp. 471 (S.D.N.Y. 1970), which is factually similar to this case, the Court found that: "The barge captain was in no way under the control of the defendant.", p. 474, and held, on authority of *Guzman* v. *Pichirilo, supra*, that: "Since all control was not relinquished, there cannot be a demise charter.", p. 475.

---

[2] Judge Mishler cited three of those cases (44a, fn. 2): *Monk* v. *Cornell Steamboat Co.*, 198 Fed. 472 (2 Cir. 1912); *The Willie*, 231 Fed. 865 (2 Cir. 1916), where the charter put the "captain * * * under [charterer's] control and orders", p. 867; and *Hastorf* v. *F. R. Long*, 239 Fed. 852 (2 Cir. 1917), where the "captain" was under "the absolute control of the charterer", p. 853. The Judge mistakenly cited *Aird* v. *Weyerhaeuser S.S. Co.*, 169 F. 2d 606 (3 Cir. 1948), cert. den. 337 U.S. 959 (1949), which held that the general agent of a Government owned ocean carrier was not liable *pro hac vice* for crew wages.

II. Navigation's agency was disclosed, and even if the agency were undisclosed, Navigation would not be liable to Esposito for P-98's unseaworthiness.

Esposito's foreman (4a) knew that Navigation was "the agent for the lines that we had at the pier, Scindia Lines and others" (5a),[3] and the foreman was told the day before Esposito's accident that the bales of sisal were to be discharged from *Jaladhanya* and put aboard P-98 (SM 16, 5a). Esposito had worked at Pier 12 a number of years (SM 66), and knew that the bales were being unloaded from *Jaladhanya* (19a). Scindia is identified as *Jaladhanya's* owner in the 1969 Record of the American Bureau of Shipping, p. 1068; 1968-1969 Lloyd's Register of Ships, vol. 1, p. 1482; 1969-1970 Lloyd's Register of Ships, vol. 1, p. 1523; 1968-1969 Lloyd's List of Shipowners, p. 274; and 1969-1970 Lloyd's List of Shipowners, p. 265, and the ship bears Scindia's stack insigne. Navigation's agency for Scindia was thereby disclosed, *Valkenburg* v. *S.S. Henry,* 295 F. 2d 330, 333 (7 Cir. 1961); *Instituto Cubano, etc.* v. *S.S. Theotokos,* 155 F. Supp. 945, 947, 948 (S.D.N.Y. 1957); *Gaete* v. *Barber Steamship Lines,* 57 Misc. 2d 167, 292 N.Y.S. 2d 155, 158, 160-161 (Sup. Ct., Kings Co. 1968), and Judge Mishler erred in holding Navigation liable as "agent of an undisclosed principal" (45a).

Even if Navigation's agency had not been disclosed, Navigation would not be liable to Esposito.

---

[3] Navigation's 1968-1969 Manhattan Telephone Directory listing, p. 1701, indicates its agency for Scindia and others, as does Navigation's present listing.

"It is contended by the plaintiffs that the defendant is estopped from denying liability * * * upon the principle that the agent of an undisclosed principal is equally liable with the principal. This is a salutary principle of law enforced against an agent acting for an undisclosed principal in cases where his action is such as to induce the other party to extend a credit on his account; or where one enters into a contract with the agent without knowing him to be such * * *. But this principle has no application where there is no contract relation induced and entered into between the plaintiff and defendant, as in this case." *American Alkali Co.* v. *Kurtz*, 134 Fed. 663, 665-666 (E.D. Pa. 1905), aff'd 138 Fed. 392 (3 Cir. 1905), cert. den. 205 U.S. 544 (1907).

"The difficulty is that plaintiff and [defendant] never even met. There was no contract at all and so no agreement between them, without which the obligation of the agent to disclose his principal is obviously not present [citations omitted]. * * * Without reliance on conduct or acts, absent words, recovery based on failure to disclose one's principal cannot be had [citations omitted]." *Gaete* v. *Barber Steamship Lines, supra*, 292 N.Y.S. 2d, p. 160.

Navigation did not contract with ITO's employee Esposito to work aboard P-98, nor did Esposito do so relying upon Navigation. The seaworthy warranty to Esposito was by P-98's owner Petterson, whom Esposito initially sued (42a, fn. 1), or, if there were a demise charter and the unseaworthy condition had arisen after the demise, by the charterer. Esposito, by his attorneys, had to sue the proper defendant, just as seamen must do, even if the Supreme

Court has to overrule itself to identify that defendant. *Cosmopolitan Shipping Co.* v. *McAllister,* 337 U.S. 783 (1949).[4]

The warranty of seaworthiness "is peculiarly and exclusively the obligation of the owner", *Seas Shipping Co.* v. *Sieracki,* 328 U.S. 85, 100 (1946); an agent is not liable for unseaworthiness. *Tamboris* v. *Kainis Compania Maritima,* 439 F. 2d 1131, 1132, fn. 1 (5 Cir. 1971); *McCoy* v. *American Israeli Shipping Co.,* 42 A.D. 2d 12, 344 N.Y.S. 2d 707, 708 (1st Dept. 1973), aff'd 34 N.Y. 2d 569, 354 N.Y.S. 2d 944 (1974).

Cannella v. *Lykes Bros. S.S. Co.,* 174 F. 2d 794 (2 Cir. 1949), cert. den. 338 U.S. 859 (1949), held that "the owner of a demised ship was directly liable to a longshoreman for injuries caused by her unseaworthiness at the time of the demise", p. 798; accord, *Williams* v. *McAllister Bros.,* 534 F. 2d 19, 23 (2 Cir. 1976). P-98's unseaworthy "rotted wood" (10a) preexisted the Feb. 27, 1969 charter to Ivaran Lines, and the initial use by Scindia on the March 18, 1969 date of Esposito's accident. *Cannella* also held that "if the demisee has become liable to a third person because of any unseaworthiness existing at the time of the demise, the demisee may recover from the owner on the owner's warranty", 174 F. 2d, p. 796, an impossibility in this case even if Navigation were demisee of P-98, because Petterson went

---

[4] To justify holding both Navigation and Scindia liable, Judge Mishler misconceived that: "The agent of an undisclosed principal is liable for its own acts * * * . The undisclosed principal is liable for the acts of its agent performed within the scope of the agency." (45a). An agent is tortiously "liable for its own acts" regardless of whether the agency is disclosed or undisclosed. Restatement of Agency (2d) §§ 343, 350. But there were no such "acts" by Navigation for which either it or Scindia can be held liable to Esposito.

bankrupt several years before Esposito sued Navigation (42a, fn. 1).[5]

We have not found any decision, and do not believe there should be any, which holds a demisee personally liable for injury caused by undiscovered latent unseaworthiness existing before the demise. *Cannella* v. *Lykes Bros. S.S. Co., supra,* 174 F. 2d, p. 795, inferred that the unseaworthy defect was patent, and judgment against the demisee for negligent failure to discover and correct the unseaworthy condition was subsequently affirmed, *Cannella* v. *United States,* 179 F. 2d 491 (2 Cir. 1950). Here, the "latent defect" "in the beams supporting the deck could not be discovered by a reasonable inspection" (46a).

The reason a demisee should not be personally liable for undiscovered latent pre-demise unseaworthiness is because of the personal obligation relationship to unseaworthiness liability,[6] persuasively substantiated in *Pichirilo* v. *Guzman,* 290 F. 2d 812, 814-815 (1 Cir. 1961), rev'd on other grounds

---

[5] None of Judge Mishler's citations in dealing with appellants' "final argument" (45a-46a) is in point. *Aird* v. *Weyerhaeuser S.S. Co., supra,* p. 5, fn. 2, exonerated a general agent from liability for crew wages; *Cromwell* v. *Slaney,* 65 F. 2d 940 (1 Cir. 1933), remanded for determination of the proper defendant where a fishing vessel was operated under lays; *Connecticut Adamant P. Co.* v. *James McWilliams Blue Line,* 149 F. Supp. 122 (S.D.N.Y. 1957), aff'd 253 F. 2d 785 (2 Cir. 1958), held the charterer liable to cargo for negligent failure to inspect pre-charter defects which, inferentially, were reasonably discoverable. Judge Mishler's interpretation (46a, fn. 3) of *The Doyle,* 105 F. 2d 113 (3 Cir. 1939), which held a demise charterer not liable for negligent cargo loss caused by latent pre-demise defect, is probably wrong because former Admiralty Rule 56 allowed impleader of persons directly liable to the libelant. 3 Moore's Federal Practice (2 ed. 1974) § 14.31 [2].

[6] The necessity that there be such relationship is particularly compelling when the unseaworthiness occurs while the owner has

369 U.S. 698 (1962), and reaffirmed in *Ramos* v. *Beauregard*, 423 F. 2d 916, 918 (1 Cir. 1970), cert. den. 400 U.S. 865 (1970). Although the Supreme Court has twice deemed it unnecessary to decide whether there can be *in rem* liability without an underlying personal obligation, *Guzman* v. *Pichirilo*[7], *supra*, 369 U.S., p. 700, fn. 3; *Reed* v. *The Yaka*, 373 U.S. 410, 412 (1963), Mr. Justice Harlan's dissents, 369 U.S., p. 704; 373 U.S., p. 419, fn. 2, endorsed the First Circuit's *Pichirilo* opinion.

III. Scindia is not liable "on the traditional concept of respondeat superior" (45a).

Since Navigation is not liable to Esposito, Scindia is not secondarily liable under the *respondeat superior* doctrine.

---

control of his ship and opportunity to rectify the condition, and before the owner warrants to the demisee that the condition does not exist. Here, it was Reel's job to inspect P-98 and notify Petterson of damage (27a, 31a), and Petterson's job to repair the damage at its yard (29a-30a).

[7] Certiorari was granted, 369 U.S., p. 699, to resolve a supposed conflict with *Grillea* v. *United States*, 229 F. 2d 687, 232 F. 2d 919, 924 (2 Cir. 1956), that: " * * * we see no reason why a person's property should never be liable unless he or someone else is liable 'in personam'." There is no conflict with *Grillea's* decision that "someone else", *i.e.*, the charterer, and not the owner, was liable *in personam* for unseaworthiness occurring after the demise, 229 F. 2d, p. 690.

Conclusion

The judgment for plaintiff-appellee should be reversed, with direction to enter judgment for defendants-appellants.

Respectfully submitted,

BURLINGHAM UNDERWOOD & LORD
Attorneys for Appellants

WILLIAM M. KIMBALL
Of Counsel

July 21, 1977

Copy received 7/21/77 (3 copies)
Fodera, Dorfman + Ferrare
By: Dra Brandis, Sec.